

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SERGIO MARROQUIN-TORRES,

Defendant.

No. 2:14-CR-0038-JLQ

MEMORANDUM OPINION RE:
SENTENCING GUIDELINE
CALCULATION

On May 16, 2014, the Defendant was sentenced pursuant to his Fast Track plea to illegal reentry as an alien into the United States after deportation in violation of 8 U.S.C. § 1326. This Memorandum Opinion explains the court's United States Sentencing Guideline calculation and rejection of the recommended 8-level enhancement contained in the abbreviated Presentence Investigation Report at ¶ 6. (ECF No. 22).

The court notes that this issue was not briefed by either party. The Government has the burden to establish whether a prior conviction may be used for a sentencing enhancement. (ECF No. 25 at 2). An uncontested PSR (as the Government's Fast Track policy apparently requires) is not always sufficient evidence. *Reina-Rodriguez v. U.S.*, 655 F.3d 1182 (9th Cir. 2011)("it is inappropriate to use a presentence report 'to determine the type or character of the conviction.'").

U.S.S.G. § 2L1.2(b)(1)(C) requires an eight-level increase in the base offense level of a defendant who unlawfully reenters the United States after a previous removal following "a conviction for an aggravated felony." Here, "aggravated felony" has the meaning assigned in 8 U.S.C. § 1101(a)(43). USSG § 2L1.2, Comment n.3(A). Section

1 1101(a)(43) defines an aggravated felony as, among other things, "illicit trafficking in
2 a controlled substance (as defined in [21 U.S.C. § 802]), including a drug trafficking
3 crime (as defined in [18 U.S.C. § 924(c)])." 8 U.S.C. § 1101(a)(43)(B). Section 924(c)
4 defines a "drug trafficking crime" as any *felony* punishable under the Controlled
5 Substances Act ("CSA"). 18 U.S.C. § 924(c)(2). For a state conviction to qualify as a
6 "felony punishable under the Controlled Substances Act": "First, the offense must be a
7 felony; second, the offense must be capable of punishment under the [CSA]." *Lopez v.*
8 *Gonzales*, 549 U.S. 47, 61 (2006) (THOMAS, J., dissenting). The federal Controlled
9 Substances Act makes it a felony to knowingly or intentionally "manufacture, distribute,
10 or dispense, or possess with intent to manufacture, distribute, or dispense," any amount
11 of marijuana, except that "distributing a small amount of marihuana for no remuneration"
12 is a misdemeanor. 21 U.S.C. § 841(a), (b)(1)(D), (b)(4). A state marijuana conviction is
13 therefore only equivalent to a federal drug felony if the offense involved payment or
14 distribution of more than a small amount of marijuana.

15 The Ninth Circuit has employed the categorical approach set forth in *Taylor v.*
16 *United States*, 495 U.S. 575, 601-02 (1990) to determine whether a criminal defendant's
17 prior conviction meets the definition of an aggravated felony. *U.S. v. Valdavinosa-Torres*,
18 704 F.3d 679 (9th Cir. 2012); *see also Moncrieffe v. Holder* (employing a categorical
19 approach in the immigration context to determine whether a state offense proscribes
20 conduct punishable as a felony under the Controlled Substances Act).

21 Under the categorical approach, the court must confine its consideration to only
22 the fact of conviction and the statutory definition of the offense. The court must not
23 "look not to the facts of the particular prior case, but instead to whether the state statute
24 defining the crime of conviction categorically fits within the generic federal definition
25 of a corresponding aggravated felony." *Moncrieffe*, 133 S.Ct. 1678 (2013). In 2011, the
26 Defendant was convicted of violating of California Health and Safety Code § 11360(a).
27 Section 11360(a) provides:

1 Except as otherwise provided by this section or as authorized by law, every person
2 who transports, imports into this state, sells, furnishes, administers, or gives away,
3 or offers to transport, import into this state, sell, furnish, administer, or give away,
or attempts to import into this state or transport any marijuana shall be punished
by imprisonment in the state prison for a period of two, three or four years.

4 Subsection (b) of the statute makes it a misdemeanor if the person "gives away, offers
5 to give away, transports, offers to transport, or attempts to transport not more than 28.5
6 grams of marijuana." The Ninth Circuit has already held that a conviction under §
7 11360(a) is not categorically a drug trafficking crime as defined in 18 U.S.C. § 924(c)(2)
8 because "the Controlled Substances Act neither mentions solicitation nor contains any
9 broad catch-all provision that could even arguably be read to cover solicitation." *See*
10 *United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001)(en banc); *see also*,
11 *Ramirez-Chavez v. Holder*, 540 Fed. Appx. 651, 652 (9th
12 Cir.2013)(unpublished)(holding that a Nevada law criminalizing the sale, manufacture,
13 delivery, or possession of a controlled substance "is not categorically an aggravated
14 felony... because the full range of conduct it criminalizes, including mere possession, is
15 broader than the relevant federal statute.").

16 Under the modified categorical approach, the court may expand its inquiry beyond
17 the fact of conviction when the statute of conviction is one "list[ing] multiple, alternative
18 elements, and so effectively creates 'several different...crimes,'" and "at least one, but
19 not all of those crimes matches the generic version." *Descamps v. United States*, 133
20 S.Ct. 2276 (2013). Section 11360(a) is divisible, as it criminalizes various discrete acts
21 (e.g., sale, importation, transportation, etc) "alternatively, with one statutory phrase
22 corresponding to the generic crime and another not." *Descamps*, 133 S.Ct. at 2286. *See*
23 e.g., *U.S. v. Corono-Rivera*, 503 Fed.Appx. 500, 502 (9th Cir. 2012), *cert denied* 133
24 S.Ct. 2040 (2013)(upholding the district court's conclusion under the modified
25 categorical approach that the Defendant's conviction for felony *sale* of marijuana in
26 violation § 11360(a) qualified as a drug trafficking offense).

1 The modified categorical approach serves the “limited function” of helping the
2 court determine “which of a statute’s alternative elements formed the basis of the
3 defendant’s prior conviction.” *Descamps v. United States*, 133 S.Ct. 2276, 2284 (2013).
4 Here, Count 2 of the state charging document to which the Defendant pleaded guilty (as
5 confirmed by the Abstract of Judgment)(attached) establishes the Defendant pleaded
6 guilty to felony *transportation* of marijuana. *See Cabantac v. Holder*, 736 F.3d 787, 793-
7 94 (9th Cir. 2013) (per curiam) (“where, as here, the abstract of judgment or minute order
8 specifies that a defendant pleaded guilty to a particular count of the criminal complaint
9 or indictment, we can consider the facts alleged in that count.”). The elements of felony
10 transportation of marijuana under § 11360(a) are: 1) the defendant transported
11 marijuana; 2) the defendant knew of its presence and illegal character; and 3) the
12 marijuana possessed weighed more than 28.5 grams. *See* Judicial Council of CA Crim
13 Jury Instr. No. 2361; Ca Crim. Jury Instruction 12.22.5; *People v. Busch*, 187
14 Cal.App.4th 150, 113 (Cal.App.3d Dist.2010)(upholding CALCRIM No. 2361).
15 “Transport” is defined as it is “commonly understood and of plain, nontechnical
16 meaning” and is established by carrying or movement from one location to another.
17 *People v. Eastman*, 13 Cal.App.4th 668, 674-77 (2007) . A conviction under § 11360(a)
18 can be supported by transportation without possession or transportation for personal use.
19 *U.S. v. Casarez-Bravo*, 181 F.3d 1074 (9th Cir. 1999)(discussing § 11360(a)).

20 The mere transportation of marijuana, without more, is not listed as a punishable
21 offense anywhere in the Controlled Substances Act. *See Alvarado-Ochoa v. Ashcroft*,
22 2003 WL 21805239, at *1 (9th Cir. Aug.6, 2003)(unpublished) (“While Alvarado's state
23 transportation [of cocaine] is a felony in California ... it is not punishable under the
24 Controlled Substances Act....”). The *elements* of the offense of felony transportation of
25 marijuana under § 11360(a) do not have an illicit trafficking nor a remuneration element.

26 The “elements-centric, ‘formal categorical approach’” precludes this court from
27 delving into the particular facts disclosed by the record of conviction other than to

1 determine “*which statutory phrase was the basis for the conviction.*” See *Descamps*, 133
2 S.Ct. at 2284-86 (“Whether *Descamps* *did* break and enter makes no difference,” because
3 “[o]ur decisions authorize review of the plea colloquy or other approved extra-statutory
4 documents only when a statute defines burglary not (as here) overbroadly, but instead
5 alternatively, with one statutory phrase corresponding to the generic crime and another
6 not.”). Because the statutory phrase the Defendant was convicted of was mere
7 transportation, Defendant’s conviction under California Health and Safety Code §
8 11360(a) does not qualify as an aggravated felony.

9 The Clerk of the court shall enter this Order and provide copies to counsel and the
10 U.S. Probation Office.

11 Dated this 21st day of May, 2014.

12 s/ Justin L. Quackenbush
13 JUSTIN L. QUACKENBUSH
14 SENIOR UNITED STATES DISTRICT JUDGE
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF TEHAMA
CRIMINAL DIVISION

FILED

SUPERIOR COURT OF CALIFORNIA

JUN - 3 2011

COUNTY OF TEHAMA, CRIMINAL DIVISION
GINA SETTER, CLERK OF THE COURT

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Case No. NCR81432
NCR81433

Plaintiff,

AMENDED
INFORMATION

vs.

SERGIO TORRES MARROQUIN and
IRAN VALDOVINOS SOLORIO,

Defendant.

SERGIO TORRES MARROQUIN and IRAN VALDOVINOS SOLORIO are accused by the District Attorney of the County of Tehama, State of California, by this Information, of the crimes of:

| | | | |
|--------------------------------|------------|--------|---|
| COUNT I: (Marroquin) | HS11379(a) | Felony | TRANSPORTATION OF A CONTROLLED SUBSTANCE |
| COUNT II: (Both) | HS11360(a) | Felony | TRANSPORTATION OF MARIJUANA |
| COUNT III: (Both) | HS11359 | Felony | POSSESSION OF MARIJUANA FOR SALE |

COUNT I

The above defendant SERGIO TORRES MARROQUIN, on or about April 3, 2011, at and in the County of Tehama, State of California, and before the making of this Information, did willfully and unlawfully transport Methamphetamine. (SEC. HS11379(a))

"Notice: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

SENTENCING RANGE: 2, 3, 4 Years

COUNT II

The above defendants SERGIO TORRES MARROQUIN and IRAN VALDOVINOS SOLORIO, on or about April 3, 2011, at and in the County of Tehama, State of California, and before the making of this Information, did unlawfully transport marijuana. (SEC. HS11360(a))

"NOTICE: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."

SENTENCING RANGE: 2, 3, 4 Years

COUNT III

The above defendants SERGIO TORRES MARROQUIN and IRAN VALDOVINOS SOLORIO, on or about April 3, 2011, at and in the County of Tehama, State of California, and before the making of this Information, did unlawfully possess for purpose of sale marijuana. (SEC. HS11359)

"Notice: Conviction of this offense will require you to register pursuant to Health and Safety Code section 11590. Failure to do so is a crime pursuant to Health and Safety Code section 11594."


SENTENCING RANGE: 16 Months, 2, 3 Years

Contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

Dated: June 2, 2011

GREGG COHEN
Tehama County District Attorney

By:


JAMES D. WAUGH,
Deputy District Attorney

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE
SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

(Not to be used for multiple count convictions or for 1/3 consecutive sentences)

CR-290.1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: TEHAMA

PEOPLE OF THE STATE OF CALIFORNIA vs
DEFENDANT: SERGIO TORRES MARROQUIN

DOB. [REDACTED] 84

CASE NUMBER
NCRB1432

SUPERIOR COURT

AUG 18 2011

AKA
CII NO.
BOOKING NO. ☐ NOT PRESENTCOMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT ☐ AMENDED
ABSTRACTDATE OF HEARING
08-08-11DEPT NO.
51JUDGE
HON. EDWARD J. KING, III, ASSIGNEDCLERK
STACI MCKENZIEREPORTER
SHARON DUNBARPROBATION NO. OR PROBATION OFFICER ☐ IMMEDIATE SENTENCING
ROSA VASQUEZCOUNSEL FOR PEOPLE
GREGG COHEN, DACOUNSEL FOR DEFENDANT ☐ APPTD.
DOUGLAS L. GARDNER

1. Defendant was convicted of the commission of the following felony:

| COUNT | CODE | SECTION NUMBER | CRIME | YEAR CRIME COMMITTED | DATE OF CONVICTION (MO./DATE/YEAR) | CONVICTED BY | | | TERM (L.N.U) | TIME IMPOSED | |
|-------|------|----------------|-------|----------------------|------------------------------------|--------------|-------|------|--------------|--------------|------|
| | | | | | | JURY | COURT | PLEA | | YRS. | MOS. |

2. H.S. 11360(a) TRANSPORTATION OF MARIJUANA

2011

07-11-11

X

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3. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

| COUNT | ENHANCEMENT | TIME IMPOSED OR "S" FOR STAYED | ENHANCEMENT | TIME IMPOSED OR "S" FOR STAYED | ENHANCEMENT | TIME IMPOSED OR "S" FOR STAYED | TOTAL |
|-------|-------------|--------------------------------|-------------|--------------------------------|-------------|--------------------------------|-------|
|-------|-------------|--------------------------------|-------------|--------------------------------|-------------|--------------------------------|-------|

4. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

| ENHANCEMENT | TIME IMPOSED OR "S" FOR STAYED | ENHANCEMENT | TIME IMPOSED OR "S" FOR STAYED | ENHANCEMENT | TIME IMPOSED OR "S" FOR STAYED | TOTAL |
|-------------|--------------------------------|-------------|--------------------------------|-------------|--------------------------------|-------|
|-------------|--------------------------------|-------------|--------------------------------|-------------|--------------------------------|-------|

5. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):
Restitution Fine(s): \$ 400 per PC 1202.4(b) forthwith per PC 2085.5; \$400 per PC 1202.46 suspended unless parole is revoked.
\$ _____ per PC 1202.44 is now due, probation having been revoked.Restitution per PC 1202.4(f): ☐ \$ _____ / ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
☐ *Victim name(s), if known, and amount breakdown in item 8 below. ☐ *Victim name(s) in probation officer's report.Fine(s): \$ _____ per PC 1202.5. \$ _____ per VC 23550 or _____ day s ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive☒ Includes: ☐ \$50 Lab Fee per HS 11372.5(a) ☒ \$360 Drug Program Fee per HS 11372.7(a) for each qualifying offense.
☒ Court Security Fee of \$ 30 per PC 1465.8. ☒ Criminal Conviction Assessment of \$ 30 per GC 70373.TESTING: a. ☐ Compliance with PC 296 verified b. ☐ AIDS per PC 1202.1 c. ☒ other (specify): SAMPLES PER PC 296.IMMEDIATE SENTENCE: ☐ Probation to prepare and submit a post-sentence report to CDCR per PC 1203c, Def't Race/Nat'l Origin _____

Other orders (specify): REGISTRATION PER HS 11590.

TOTAL TIME IMPOSED EXCLUDING COUNTY JAIL TERM:

2

0

☐ This sentence is to run concurrent with (specify):Execution of sentence imposed: a. ☒ at initial sentencing hearing. b. ☐ at resentencing per decision on appeal. c. ☐ after revocation of probation.
d. ☐ at resentencing per recall of commitment. (PC 1170(d).) e. ☐ other (specify):

| DATE SENTENCE PRONOUNCED | CREDIT FOR TIME SPENT IN CUSTODY | TOTAL DAYS, INCLUDING | ACTUAL LOCAL TIME 1 | LOCAL CONDUCT CREDITS 0 | TIME SERVED IN STATE INSTITUTION: | DMH | CDCR | CRC |
|--------------------------|----------------------------------|-----------------------|---------------------|-------------------------|-----------------------------------|-----|------|-----|
|--------------------------|----------------------------------|-----------------------|---------------------|-------------------------|-----------------------------------|-----|------|-----|

08-08-11

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INCL

4019

2933.1

TIME SERVED

IN STATE

INSTITUTION:

DMH

CDCR

CRC

The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☒ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ Other (specify):

CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE

(SEAL)

DATE

08-18-11